ECLI:EU:C:2017:711

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

21 September 2017 (*)

(Reference for a preliminary ruling — Social policy — Collective redundancies — Directive 98/59/EC — Article 1(1) and Article 2 — Concept of 'redundancies' — Assimilation to redundancies of 'terminations of an employment contract which occur on the employer's initiative' — Unilateral amendment by the employer of working and pay conditions — Determination of the employer's 'intention' to effect redundancies)

In Case C-429/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Łodzi, VII Wydział Pracy i Ubezpieczeń Społecznych (Regional Court, Łódź, Labour and Social Insurance Division No VII, Poland), made by decision of 30 June 2016, received at the Court on 2 August 2016, in the proceedings

Małgorzata Ciupa,

Jolanta Deszczka,

Ewa Kowalska,

Anna Stańczyk,

Marta Krzesińska,

Marzena Musielak,

Halina Kaźmierska,

Joanna Siedlecka,

Szymon Wiaderek,

Izabela Grzegora

v

II Szpital Miejski im. L. Rydygiera w Łodzi, now Szpital Ginekologiczno-Położniczy im. dr L. Rydygiera sp. z o.o. w Łodzi,

THE COURT (Tenth Chamber),

composed of M. Berger, President of the Chamber, A. Borg Barthet and F. Biltgen (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– II Szpital Miejski im. L. Rydygiera w Łodzi, now Szpital Ginekologiczno-Położniczy im. dr L. Rydygiera sp. z o.o. w Łodzi, by B. Marchel, radca prawny,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by A. Stobiecka-Kuik, L. Baumgart and M. Kellerbauer, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

2 The request has been made in proceedings between Ms Małgorzata Ciupa and Others and their employer, II Szpital Miejski im. L. Rydygiera w Łodzi, now Szpital Ginekologiczno-Położniczy im. dr L. Rydygiera sp. z o.o. w Łodzi (L. Rydygier Municipal Hospital No II, Łódź, now Dr L. Rydygier Gynaecological and Obstetrical Hospital, Łódź, 'the Łódź Hospital'), concerning the hospital's decision to issue employees with notices of amendment, leading to the termination of the employment relationships of some of those employees without the redundancy procedure laid down by the national law transposing that directive being followed.

Legal context

Directive 98/59

3 Article 1 of Directive 98/59, 'Definitions and scope', provides:

'1. For the purposes of this Directive:

(a) “collective redundancies” means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:

– at least 10 in establishments normally employing more than 20 and less than 100 workers,

– at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

– at least 30 in establishments normally employing 300 workers or more,

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

(b) “workers’ representatives” means the workers’ representatives provided for by the laws or practices of the Member States.

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer’s initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.

2. This Directive shall not apply to:

…

(b) workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies);

…’

4 Article 2 of Directive 98/59 reads as follows:

‘1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers’ representatives in good time with a view to reaching an agreement.

2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

…’

5 Article 5 of Directive 98/59 provides:

‘This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers.’

Polish law

6 Article 23[1] of the Kodeks Pracy (Labour Code), enacted by the Law of 26 June 1974 (Dz. U., 1974, No 24, item 141), as amended ('the Labour Code'), concerning the consequences of the transfer of an undertaking, provides:

'1. Where an undertaking or part of an undertaking is transferred to another employer, he shall become by law a party to the previous employment relationships, subject to the provisions of paragraph 5.

2. The previous and the new employer shall be jointly and severally liable for obligations arising from the employment relationship which arose before the transfer of part of an undertaking to another employer.

3. If no company trade union organisations are operating at the establishment of the employers referred to in paragraph 1, the previous and the new employer shall inform their employees in writing of the expected date of the transfer of the undertaking or part of the undertaking to the other employer, the reasons for it, its legal, economic and social consequences for the employees, and also the intended measures concerning the employment conditions of the employees, in particular working, pay and retraining conditions; the information must be provided at least 30 days before the expected date of transfer of the undertaking or part of the undertaking to the other employer.

4. Within two months of the transfer of the undertaking or part of the undertaking to another employer, the employee may without giving ordinary notice terminate the employment relationship on the expiry of seven days. Termination of the employment relationship in this way shall produce for the employee the consequences which the provisions of labour law establish for termination of the employment relationship by the employer by giving notice.

5. The employer shall, as from the date of taking over the undertaking or part of the undertaking, be obliged to offer new working and pay conditions to employees who previously worked on a basis other than an employment contract and to determine a period of not less than seven days within which the employees can submit a declaration of acceptance or refusal of the conditions offered. If no new working and pay conditions are agreed, the previous employment relationship shall end on expiry of a period equal to the notice period, counting from the date on which the employee submitted the declaration of refusal to accept the conditions offered or from the date by which he could have submitted such a declaration. The second sentence of paragraph 4 shall apply *mutatis mutandis*.

6. The transfer of the undertaking or part of the undertaking to another employer cannot constitute a reason justifying the giving of notice to terminate the employment relationship by the employer.'

7 Article 42(1) of the Labour Code provides that the provisions on the giving of notice to terminate the employment contract are to apply *mutatis mutandis* to the giving of notice to amend working and pay conditions arising from the employment contract. Under Article 42(2), working or pay conditions are regarded as amended when new conditions have been offered to employees in writing. Under Article 42(3), where an employee refuses to accept the proposed working or pay conditions, the employment contract is terminated on expiry of the period specified in the notice. If, halfway through that period, an employee has not expressed his objection to the proposed conditions, he is deemed to have accepted them.

8 Article 241^7 of the Labour Code, on the rules for termination and notice of termination of a collective agreement, provides in paragraph 1:

'A collective agreement shall be terminated:

1) on the basis of a declaration agreed by the parties;

2) on expiry of the period for which it was concluded;

3) on expiry of the period of notice given by one of the parties.'

9 Article 241^8 of the Labour Code, on the application of the provisions of the collective agreement after transfer of the undertaking, provides in paragraph 2:

'On expiry of the application period of the previous collective agreement, the conditions of employment contracts or other acts which form the basis of entering into the employment relationship arising from that collective agreement shall apply until expiry of the notice period in respect of those conditions. The provision in the second sentence of Article 241^{13}(2) shall apply *mutatis mutandis*.'

10 Article 241^{13}(2) of the Labour Code provides:

'Provisions of the collective agreement which are less favourable for the employees shall be introduced by giving notice to the employee to amend the previous conditions of the employment contract or other act which forms the basis of entering into the employment relationship. When notice is given to amend the previous conditions of the employment contract or other act which forms the basis of entering the employment relationship, the provisions which restrict the admissibility of notice to amend such a contract or act shall not apply.'

11 In accordance with Article 1 of the Ustawa o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników (Law on special rules on the termination of employment relationships with employees for reasons unrelated to the employees) of 13 March 2003 (Dz. U., 2003, No 90, item 844), as amended ('the Law of 2003'):

'1. The provisions of this law shall apply where it is necessary for an employer employing at least 20 employees to terminate the employment relationships for reasons unrelated to the employees, by notice of termination given by the employer, and also pursuant to an agreement between the parties, where for a period not exceeding 30 days the redundancy covers at least:

1) 10 employees, where the employer employs fewer than 100 employees,

2) 10% of employees, where the employer employs at least 100 but fewer than 300 employees,

3) 30 employees, where the employer employs at least 300 or more employees …'

12 Article 2 of the Law of 2003 reads as follows:

'1. The employer shall be required to consult the company trade union organisations operating at that establishment on contemplated collective redundancies.

2. The consultation referred to in paragraph 1 shall concern in particular possibilities of avoiding or reducing the scale of the collective redundancy and employee matters related to that redundancy, including especially possibilities of retraining or professional training, and also finding other employment for employees who are made redundant.

3. The employer shall be required to inform the company trade union organisations in writing of the reasons for the collective redundancy contemplated, the number of employees and the professional groups to which they belong, the professional groups of employees covered by the collective redundancy contemplated, the period over which such redundancies will take place, the proposed criteria for selecting employees for the collective redundancy, the order of dismissal of the employees, and the proposals for resolving employee matters related to the collective redundancy, and, where cash benefits are provided, the employer shall in addition be obliged to present the methods of determining their amount.

…'

13 Article 3(1) of the Law of 2003 provides that, within 20 days from the date of the provision of the information referred to in Article 2(3) of the law, the employer and the trade union organisations are to conclude an agreement. Under Article 3(2) of that law, the agreement is to lay down the rules to be followed with respect to the employees covered by the collective redundancy contemplated and the employer's obligations in so far as is necessary to resolve other employee matters relating to the collective redundancy contemplated.

14 Article 5 of the Law of 2003, applicable at the material time for the main proceedings, provided:

'1. Where employees are given notice of termination of their employment relationships in connection with a collective redundancy, Articles 38 and 41 of the Labour Code shall not apply, without prejudice to paragraphs 2 to 4, and the separate provisions concerning special protection for employees against notice of termination or termination of an employment relationship shall not apply, without prejudice to paragraph 5.

2. If the agreement referred to in Article 3 is not concluded, where employees are given notice of termination of their employment relationships, and also of amendment of their pay and working conditions, Article 38 of the Labour Code shall apply.

…

5. During a period of special protection against notice of termination or termination of the employment relationship, the employer may give notice only of amendment of previous pay and working conditions to an employee:

1) who is not more than four years from reaching retirement age, pregnant employees, employees on a period of maternity leave, adoption leave, parental leave or paternity leave;

2) who is a member of the works council of a State undertaking;

3) who is a member of the board of the company trade union organisation;

…

6. Where a notice of amendment of pay and working conditions results in a reduction in remuneration, the employees referred to in paragraph 5 shall be entitled, until the end of the period during which they would have enjoyed special protection against notice of termination or termination of the employment relationship, to a compensatory allowance calculated according to the principles arising from the Labour Code.

7. Where employees are given notice of termination of the employment relationship in connection with a collective redundancy, employment contracts concluded for a specific period or for the performance of specific work may be terminated by either party on two weeks' notice.'

The dispute in the main proceedings and the question referred for a preliminary ruling

15 Ms Ciupa and Others are employed by the Łódź Hospital under full-time employment contracts of unlimited duration.

16 From 2009 the financial losses of the Łódź Hospital increased from year to year. In 2013 it was decided that the Łódź Hospital should become a commercial company, in preference to liquidation, which would have involved the loss of more than 100 jobs. On conversion, it was not intended to reduce jobs, so that the Łódź Hospital would be able to retain its contract with the national health fund for the provision of medical services. After exhausting all savings opportunities not affecting wages, the Łódź Hospital found itself forced to reduce the level of remuneration of its entire workforce. It therefore proposed a temporary 15% pay cut to all employees. About 20% of the employees accepted the cut. The other employees were given a notice of amendment of working and pay conditions on the ground of the 'need to carry out restructuring of the [Łódź Hospital's] personnel costs dictated by the difficult financial situation'. The letter proposed that the employees, after expiry of the notice period, would receive a pay cut that would apply until 1 February 2015.

17 Ms Ciupa and Others brought an action before the Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi (District Court for Łódź-Śródmieście, Łódź, Poland), seeking for the amendment of their working and pay conditions to be declared inapplicable. The court dismissed the action. The Łódź Hospital, while consulting employees who were members of the trade union organisation within the company individually on the proposed amendment, did not contemplate effecting a collective redundancy, and therefore did not initiate the procedure applicable to redundancies.

18 According to the referring court, which is hearing the appeal brought by Ms Ciupa and Others against the decision of the Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi (District Court for Łódź-Śródmieście, Łódź), the case-law of the Sąd Najwyższy (Supreme Court, Poland) on the question of whether the employer is subject to the obligations laid down in Articles 2 to 4 of the Law of 2003 when he gives his employees a notice of amendment is unclear. However, the referring court considers that that case-law tends to suggest that those articles do apply in a case such as that in the main proceedings.

19 The referring court further considers that, in the case of an employer employing at least 20 employees who contemplates amending the conditions in the contracts of employees who number at least the number of employees specified in Article 1(1) of the Law of 2003, the obligation to consult the trade unions exists alongside the obligation to follow the procedure laid down by that law, in particular in Articles 2 to 4 and 6. In such a case, the number of employment relationships that come to an end following the rejection of the new conditions of employment proposed by the employer and the fact that they come to an end as a result of the will of the employees are of no relevance. All that matters is that the amendment to the conditions of employment is initiated by the employer and that the subsequent termination of the contract as a consequence does not depend on the will of the

employer. In accordance with Article 2(1) of the Law of 2003, where an employer contemplates effecting collective redundancies, he is required to consult the trade union organisations operating at the establishment. The consultations thus relate to what is 'contemplated' by the employer, not to the amendments accepted or to the terminations of employment contracts that may follow from refusals by employees. An employer who contemplates giving notices of amendment to his employees must therefore take account of the number of notices in order to determine whether the amendments contemplated are covered by the provisions on collective redundancies and consequently whether he is required to consult the trade unions.

20 Since, however, the Court of Justice has not yet ruled on how the notices of amendment should be classified from the point of view of Directive 98/59, the referring court entertains doubts as to its reading of that directive.

21 In those circumstances, the Sąd Okręgowy w Łodzi, VII Wydział Pracy i Ubezpieczeń Społecznych (Regional Court, Łódź, Labour and Social Insurance Division No VII, Poland) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 2 of Directive 98/59 … to be interpreted as meaning that an employer employing at least 20 employees who contemplates giving notice of amendment of contractual conditions to employees, the number of whom corresponds to the number of employees provided for in Article 1(1) of the [Law of 2003], is required to apply the procedures specified in Articles 2 to 4 and 6 of that law, that is, does that obligation apply in the situations referred to in:

– Article 241^{13}(2) in conjunction with Article 241^{8}(2) and Article 23^{1} of the Labour Code;

– Article 241^{13}(2) in conjunction with Article 77^{2}(5) or Article 241^{7}(1) of the Labour Code;

– Article 42(1) of the Labour Code in conjunction with Article 45(1) of the Labour Code?'

Consideration of the question referred

22 It should be observed, as a preliminary point, that, in the question it has referred for a preliminary ruling, the referring court mentions a number of provisions of national law and contemplates various possible classifications in national law of the situation at issue in the main proceedings.

23 It must be recalled that, as regards the interpretation of provisions of national law, the Court is in principle required to base its consideration on the description given in the order for reference. It is settled case-law that the Court does not have jurisdiction to interpret the internal law of a Member State (judgment of 17 March 2011, *Naftiliaki Etaireia Thasou and Amaltheia I Naftiki Etaireia*, C-128/10 and C-129/10, EU:C:2011:163, paragraph 40 and the case-law cited).

24 Consequently, the Court must rule on the request for a preliminary ruling on the basis of the premisses that follow from the order for reference, without carrying out an interpretation of national law according to the three abstract situations mentioned in the question.

25 In those circumstances, the referring court's question must be understood as asking essentially whether Article 1(1) of Directive 98/59 must be interpreted as meaning that a unilateral amendment of conditions of pay by the employer, to the detriment of the employees, which, in the event of an employee's refusal, entails the termination of the contract of employment must be regarded as a 'redundancy' within the meaning of that provision, and whether Article 2 of that

directive must be interpreted as meaning that an employer is required to carry out the consultations provided for in Article 2 where he contemplates effecting such a unilateral amendment of the conditions of pay.

26 To answer that question, it should be recalled, to begin with, that it is apparent from the second subparagraph of Article 1(1) of Directive 98/59, from which it follows that the directive is applicable only where there are at least five 'redundancies', that the directive distinguishes between 'redundancies' and 'terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned' (see, to that effect, judgment of 11 November 2015, *Pujante Rivera*, C-422/14, EU:C:2015:743, paragraphs 44 and 45).

27 As regards the concept of 'redundancy' in point (a) of the first subparagraph of Article 1(1) of Directive 98/59, the Court has held that that directive must be interpreted as meaning that the fact that an employer, unilaterally and to the detriment of the employee, makes significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned falls within that concept (judgment of 11 November 2015, *Pujante Rivera*, C-422/14, EU:C:2015:743, paragraph 55).

28 It follows that, if an employer, unilaterally and to the detriment of the employee, makes a non-significant change to an essential element of the contract of employment for reasons not related to the individual employee concerned, or makes a significant change to a non-essential element of that contract for reasons not related to the individual employee, that may not be regarded as a 'redundancy' within the meaning of that directive.

29 The notice of amendment at issue in the main proceedings provides for a temporary reduction of remuneration by 15%, followed some months later by a restoration of the remuneration to its original level. While it cannot be disputed that remuneration is an essential element of the employment contract and a 15% reduction of remuneration could in principle be regarded as a 'significant change', the temporary nature of the reduction nevertheless markedly reduces the extent of the proposed amendment of the contract of employment.

30 However, it is ultimately for the referring court, which has sole jurisdiction to assess the facts, to determine in the light of all the circumstances of the case whether the temporary reduction of remuneration at issue is to be regarded as a significant change.

31 In any event, even if the referring court were to consider that the notice of amendment at issue in the main proceedings is not covered by the concept of 'dismissal', a termination of the contract of employment following the employee's refusal to accept a change such as that proposed in the notice of amendment must be regarded as constituting a termination of an employment contract which occurs on the employer's initiative for one or more reasons not related to the individual workers concerned, within the meaning of the second subparagraph of Article 1(1) of Directive 98/59, so that it must be taken into account for calculating the total number of redundancies.

32 As regards the question of the point in time from which an employer is required to carry out the consultations provided for in Article 2 of that directive, the Court has taken the view that the obligations of consultation and notification come into being prior to the employer's decision to terminate employment contracts (judgments of 27 January 2005, *Junk*, C-188/03, EU:C:2005:59, paragraph 37, and of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 38) and that the achievement of the objective expressed in

Article 2(2) of Directive 98/59 of avoiding terminations of employment contracts or reducing their number would be jeopardised if the consultation of representatives were subsequent to the employer's decision (judgments of 27 January 2005, *Junk*, C-188/03, EU:C:2005:59, paragraph 38, and of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 46).

33 It should be added that the dispute in the main proceedings, like the case in which judgment was given on 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others* (C-44/08, EU:C:2009:533, paragraph 37), is linked to economic decisions which, as may be seen from the order for reference, were not directly concerned with terminating specific employment relationships, but might nevertheless have repercussions on the employment of a number of employees.

34 In paragraph 48 of its judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others* (C-44/08, EU:C:2009:533), the Court held that the consultation procedure laid down in Article 2 of Directive 98/59 must be started by the employer once a strategic or commercial decision compelling him to contemplate or to plan for collective redundancies has been taken.

35 In the present case, as stated in paragraph 16 above, in order to avoid liquidation of the Łódź Hospital and the loss of jobs, a number of changes were made. When those changes proved inadequate to ensure the survival of the Łódź Hospital, the hospital found it necessary to proceed to the amendments proposed, so as to avoid having to take decisions directly concerned with terminating specific employment relationships. In such a situation, the Łódź Hospital could reasonably expect that a number of employees would not accept the amendment of their working conditions, and that their contracts would be terminated as a result.

36 Consequently, since the decision to issue the notices of amendment necessarily meant for the Łódź Hospital that collective redundancies were contemplated, it was for the hospital, in so far as the conditions defined in Article 1(1) of Directive 98/59 were satisfied, to carry out the consultations provided for in Article 2 of that directive.

37 That conclusion is all the more compelling in that the purpose of the obligation of consultation laid down in Article 2 of the directive, namely to avoid terminations of employment contracts, or to reduce their number, and to mitigate the consequences (judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 46), and the objective pursued by the notices of amendment, according to the referring court, namely to avoid individual redundancies, coincide to a large extent. Where a decision entailing an amendment of working conditions may enable collective redundancies to be avoided, the consultation procedure provided for in Article 2 of the directive must start when the employer contemplates making such amendments (see, to that effect, judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 47).

38 In the light of all the above considerations, the answer to the question is that Article 1(1) of Directive 98/59 must be interpreted as meaning that a unilateral amendment of conditions of pay by the employer, to the detriment of the employees, which, in the event of an employee's refusal, entails the termination of the contract of employment is capable of being regarded as a 'redundancy' within the meaning of that provision, and that Article 2 of that directive must be interpreted as meaning that an employer is required to carry out the consultations provided for in Article 2 where he contemplates effecting such a unilateral amendment of the conditions of pay, in so far as the conditions laid down in Article 1 of the directive are satisfied, which is for the referring court to ascertain.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 1(1) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as meaning that a unilateral amendment of conditions of pay by the employer, to the detriment of the employees, which, in the event of an employee's refusal, entails the termination of the contract of employment is capable of being regarded as a 'redundancy' within the meaning of that provision, and Article 2 of that directive must be interpreted as meaning that an employer is required to carry out the consultations provided for in Article 2 where he contemplates effecting such a unilateral amendment of the conditions of pay, in so far as the conditions laid down in Article 1 of the directive are satisfied, which is for the referring court to ascertain.

[Signatures]

* Language of the case: Polish.